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ABSTRACT

Principals and other educators fear litigation over defamation. Defamation means an injury to character or reputation by false, malicious statements, whether by printed words (libel) or by spoken words (slander). To constitute defamation, the words must be actionable, defamatory, refer to the plaintiff, and be communicated to others. If the words are not on their face harmful, the plaintiff may have to prove harm. A major issue in defamation concerns whether the plaintiff or defendant is a public or private figure; public figures need to show the words are malicious, whereas private figures do not. Twenty-one cases involving educators, in which the question of public or private figure had to be determined, are reviewed. Eight cases concern the educator as plaintiff and involve teachers, coaches, principals, and college administrators filing suit. The 13 cases in which the educator is the defendant involve college teachers suing administrators, parents suing school doctors, and school teachers suing administrators and boards. The defenses noted against defamation suits include the truth of the statements and the defendant's privilege, either absolute (in legislative, judicial, quasi-judicial, or executive proceedings) or qualified (involving fair comment on public matters or figures), to use the words. (RW)

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A Legal Memorandum

NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS
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DEFAMATION: A WORRY FOR ALL SEASONS

"Good name in man and woman, ... is the
immediate jewel of their souls."
Othello, Act III, Scene III,
William Shakespeare

Fear of being sued is an affliction common to school employees generally and to principals in particular, perhaps because they are the focal point in many confrontations. Fear of defamation litigation is a major concern. This Memorandum will review litigation in this area to see whether it supports that fear.

Defamation is generally defined as an injury to a person's character or reputation by a false, malicious statement. It includes both libel and slander. In essence, libel is defamation by the printed word; slander is defamation by the spoken word. In legal parlance, defamation may be per se or per quod. Per quod means the words are not on their face harmful; harm must be proven. In per se defamation damages are presumed merely from the utterance or printed piece.

In either case, to prove defamation the plaintiff must establish (1) "actionable" words; (2) that the words refer to the plaintiff; (3) that the words are defamatory in their ordinary and normal meaning and context; and (4) that the defamation was communicated. If the words are per quod defamation, the plaintiff must also prove damages; that is, proof of material or pecuniary loss, injury to the plaintiff's reputation or standing in the community, or mental and emotional distress. If the words are per se defamation, then proof of injury is presumed and general damages may be awarded without proof. In either a per quod or a per se defamation case, the court may also award punitive damages in addition to general damages, on a showing of malicious intent or other bad motive.

An injury to reputation may also become the basis for a constitutional claim. The U.S. Supreme Court held in Board of Regents v. Roth* that a public employee may suffer such an injury by the manner in which he is dismissed. Therefore, if a teacher is dismissed and the reasons for the dismissal are made public

*Citations of cases have been omitted for easier reading, but are available upon request from NASSP's General Counsel.

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by the employer, and those reasons seriously damage his standing and association in the community or impose a stigma on him that forecloses his freedom to take advantage of other employment opportunities, the teacher is entitled to a due process hearing to attempt to clear his name. However, defamation alone does not give rise to a constitutional claim. In Bishop v. Wood, the Court held that stigmatizing charges must be published by the employer to trigger a right to a due process hearing.

The Public Figure Doctrine

Both sides of the coin must be considered when discussing defamation in relation to the school principal. On one side, the principal is the plaintiff, alleging he has been defamed by a member of the public, a pupil, or a teacher. On the other side, the principal is a defendant, against whom a defamation action is being brought. When the principal is the plaintiff, the first issue to be determined is whether the principal is a "private" or a "public" figure.

In 1964, the U.S. Supreme Court, in New York Times v. Sullivan, held that media critics of "public officials" have a constitutional privilege of defamatory criticism, unless such a plaintiff can prove the defamatory statement was published with "actual malice." Obviously, this is difficult to do, so creation of this classification greatly increased the protection afforded the media against defamation charges. The Supreme Court faced this issue again in 1967. Wally Butts, athletic director of the University of Georgia, claimed that an article in the Saturday Evening Post magazine accused him of "fixing" a football game with Paul Bryant, coach of the University of Alabama. Butts' suit was consolidated with a libel case brought by former General Edwin Walker against the Associated Press for review by the Supreme Court. General Walker claimed that the Associated Press accused him of leading a charge against federal marshals and encouraging persons to use violence during the riots attending James Meredith's enrollment at the University of Mississippi.

In its decision, Curtis Publishing Co. v. Butts, the Court extended the New York Times rule to Butts and Walker, even though they were not public officials, because they were "public figures." It defined such persons as those "who are intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." Butts had become a "public figure" because of his position as athletic director and football coach. Walker became a "public figure" by virtue of his involvement in an important public controversy. The Court held that such "public figures," like public officials, may recover damages for a defamatory falsehood only upon a showing of actual malice.

In the 1974 case of Gertz v. Welch, a lawyer was called a Leninist, the "architect of a conspiracy to discredit the local police," and a member of a Communist organization in the John Birch Society magazine. The editor of the magazine argued that he did not know the statements were false, and that he printed the article without "actual malice." The Court held that the New York Times privilege did not apply to a private individual defamed by a media

critic, and Gertz, therefore, did not have the burden of proving actual malice. The Court found the public/private dichotomy represented a balancing between the state's interest in compensating persons for harm due to defamation and the freedoms of speech and press necessary for First Amendment breathing space. In ruling for the plaintiff, the Court held: "Absent clear evidence of general fame and notoriety in the community and pervasive involvement in the affairs of society, an individual should not be deemed a public personality."

Case law of the definition of a public versus a private figure has continued to develop. In Hutchinson v. Proxmire, decided in 1979, a university professor, given a "Golden Fleece Award" by Senator William Proxmire, was held not to be a public figure. The Court said that he had not invoked the degree of public attention necessary to become a "public figure" prior to the controversy, that his contact with the media was simply in response to the unfavorable publicity after the Award, and that he did not thrust himself into the public light.

Some courts have developed a doctrine recognizing some people as public figures, but only for limited purposes. A limited-purpose public figure is an individual who voluntarily involves himself, or allows himself to be drawn into a particular public controversy.

For example, in a New Jersey case, the president and secretary-treasurer of a citizens' association conducted a campaign in opposition to a new firehouse. The newspaper published allegedly defamatory statements about the association officers. The court held the plaintiffs were not public figures for all purposes, but by "thrusting themselves" into major roles in a public controversy to influence the issue, by receiving extensive media coverage, and by having access to the media, they became public figures within the context of this issue.

To summarize: A public official or public figure suing a media defendant for defamation must prove such publication intended actual malice, if he is to recover damages. A private person, however, may succeed in litigation merely by establishing the falsity of statements and other requirements of state law, a much easier task.

Thus, in any case in which principals believe they have been defamed, the first question to be determined is whether they are "public officials" or "public figures" in the sense recognized by the law. A number of the cases dealing with this issue as it involves school employee plaintiffs are reviewed below.

The Educator as Plaintiff

In Basrich v. Rodeghero, plaintiffs were coaches, teachers, and a union who sued a newsletter publisher for libel arising out of a dispute over membership in rival unions. The court said:

> Plaintiffs are public employees, hired by the school board and paid with public funds. As coaches and teachers in a local high school they maintain highly responsible positions in the community.... Public school

> systems, their athletic programs and those who run them are consistent subjects of intense public interest and substantial publicity.... Public school teachers and coaches and their policies are to the community as are other "public officials" and "public figures." There is a strong interest in debate on public issues, and... a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Plaintiffs are within the New York Times v. Sullivan rule.

In Kapiloff v. Dunn, a high school principal's suit claiming that an article in which a newspaper rated the plaintiff as "unsuitable" was libelous, the court said:

> It is plain that as a high school principal...Dunn was within the public figure/public official classification and that his suitability for the position was a matter of public or general interest or concern. The right to recover for any injury to his reputation by the libel here must be tested by the New York Times standard.

While originally confined to media criticism as a means of providing additional protection for public debate, some courts have begun applying the protection afforded by the public official and public figure doctrines to defendants other than the media.

In Reaves v. Foster, for example, pamphlets written by students and members of a parents' club portrayed the principal of a public school in a cartoon as a puppet and dummy for the superintendent of schools, a betrayer of his race, and an "Uncle Tom." Ignoring the fact that the pamphlets were not public media in the usual sense, the court said:

> The courts have inferentially and actually extended the New York Times v. Sullivan rule not only to include public officials, but to include anyone engaged in activity related to matters of public interest, public issues, or concerns particularly if connected with government.... Under the doctrine of fair comment, a man "occupying a prominent position, public or quasi-public in nature is subject to severe criticism and malice is not presumed, but must be proven."

In Sewell v. Brookbank, parents submitted a list of grievances to the principal about the plaintiff teacher. When they received no satisfaction the parents appealed to the superintendent, and then to the board of education. The teacher sued the parents. Holding the teacher to be a public official, and in absence of proof of actual malice by the parents, the case was dismissed.

In some cases, the courts have found school employees to be "limited-purpose public figures." In Byers v. Southeastern Newspapers, a newspaper published an article in which the dean of Savannah State College questioned the legality of the college president's abolition of the dean's position. The court held that the controversy surrounding the restructuring of the administration of

a public college was of general public interest. The dean was found to have thrust himself into the controversy, attempted to influence others, and invited attention and comment. He was, therefore, held to be a "limited-purpose public figure."

In a few cases, the courts have held that school employees are not public figures. In Poe v. San Antonio Express News Corp. a high school teacher was accused by a female student of sexually molesting her in class. After police and school investigations, the teacher was cleared. The mother of the girl then telephoned a newspaper columnist who wrote about the incident. The teacher was then indicted and tried for indecent liberties with a child. He was found not guilty. In the suit against the newspaper, the court held the teacher was not a public figure and that, as a private person, he could recover upon proof of the newspaper's negligence, without establishing actual malice.

In Franklin v. Lodge 1108, a social studies teacher, Franklin, purchased a book for her class that contained material about revolutions, sex, and drugs. Parents questioned use of the book and the superintendent required the teacher to limit her assignments in the book. The Elks Lodge sent information about the dispute to the Elks Magazine, which published an editorial about the book and questioned the fitness of Franklin to teach. She sued the magazine. The court found that the teacher was not an employee who has, or appears to the public to have, substantial responsibility for or control over the conduct of governmental affairs and said:

> The governance or control of a classroom a teacher might be said to exercise over the conduct of government is at most remote and philosophical.

The court also held the teacher was not a public figure because she did not voluntarily engage in the controversy or take an active role, and she did not initiate the controversy by ordering the books.

In McCutcheon v. Moran, the court reached a similar conclusion in the case of a principal who alleged that she was libeled when she was accused of battery by a school janitor at a school board trial committee hearing. The court, citing Franklin v. Lodge 1108, said:

> We are unwilling to place the imprimatur of "public official" on a school teacher.... The relationship a public school teacher or principal has with the conduct of government is far too remote, in our minds, to justify exposing these individuals to...assault upon his or her reputation.

The Educator as Defendant

Various defenses are available to a school employee who is sued for defamation. First, of course, is the defense of truth, which is a complete defense, if the publication was made with good motives and for justifiable ends. But since the

law presumes any alleged defamation to be false, the defendant must prove the truth of his statement.

Other defenses, such as absolute or qualified privilege, may not be as well known. An "absolute" privilege completely excuses the defamatory statement. Absolute privilege is accorded speech made in legislative, judicial, and executive proceedings because freedom of speech in these arenas is viewed as necessary to the performance of public duties. This privilege has been extended, in several cases, to speech in a quasi-judicial proceeding. In the McCutcheon case (above), for example, the court held that, even if the janitor's statement was defamatory, it was absolutely privileged because it was made to a quasi-judicial body.

A "qualified" privilege also excuses defamatory speech, and has wider application to situations in which educators may be involved. Under the common law, there is a qualified privilege for fair comment respecting not only public figures and public officials, but all matters of public concern.

In Colson v. Stieg, the court held that the New York Times holding concerning the fair comment privilege should apply to comments on all matters of public concern. When a college professor sued his department chairman for defamatory comments made during a personnel committee meeting regarding his tenure, the court found the rule of fair comment on matters of public concern was applicable to this group if free and uninhibited discussion was to be preserved.

There are a number of interesting cases involving the application of qualified privilege to other school-related issues. Comments made by educators about students in school records have been accorded a qualified privilege. In Virgil v. Rice, a physician incorrectly notified school authorities that a 13-year old student was pregnant. The mother repeatedly brought the error to his attention, but the physician refused to change his report. The court held that, although the original report to the school by the defendant was subject to a qualified privilege, the doctor's failure to correct the report evidenced malice sufficient to destroy the privilege.

In an early case, Baskett v. Crossfield, when a university president believed a student was exposing himself in public he was expelled. The president of the university then wrote a letter to his parents explaining the reason for the school's action and giving the reasons for the expulsion. The student sued the university president, but the court found the communication was privileged and within the scope of the president's responsibility.

There is also a common law privilege as to communications between parties sharing an interest or duty, including educators. In Zeinfeld v. Hayes Freight Lines, Inc., the court held that this qualified privilege requires the communicating person to believe that, in the discharge of his duty, or in the interest of society, he must communicate. The court stated that such a communication is privileged, even though the duty is not a legal one, but a moral or social duty. If the communication is made in good faith and believed to be true, even if the communication is false, it is conditionally privileged.

Under this doctrine, if a student lists an educator as a reference or asks an administrator to write a letter of recommendation in his behalf, communications from the educator relating to the student's character and ability have a qualified privilege. In Lattimore v. Tyler Commercial College, a college president's true statement to a prospective employer that a former student had been jailed for theft was held privileged unless the statement was actuated by malice.

In Hett v. Ploetz, a superintendent wrote a letter of reference to a district considering employment of a teacher. The letter said the teacher did not belong in the teaching field. The teacher sued for defamation. The court held the superintendent was privileged to give a critical appraisal to help a prospective employer evaluate the teacher's qualifications. The letter was not malicious because it did not exceed the scope of the inquiry, reflected the superintendent's knowledge, and was supported by the teacher's record.

In McLaughlin v. Tilendis, the superintendent made a recommendation not to hire the plaintiff teachers after discussing their qualifications and teaching abilities with the school board. The court held the comments were absolutely privileged, being within the duty of the superintendent and the school board.

In McGowen v. Prentice, the principal had recommended to the school board the plaintiff not be rehired, referring to the teacher as a "nut." The court held that the recommendation was not defamatory, but, even if it was, the court held, "A good faith communication between parties sharing an interest or duty (here, providing good teachers in public schools) enjoys a privilege against suit for defamation in Louisiana."

In Ranous v. Hughes, the president of the school board, in a letter dismissing a teacher, indicated that the teacher was guilty of an offensive manner, utter dispassion, intemperate and unpatriotic behavior. The court found that school board members were entitled to conditional privilege.

A number of cases involve parental and public comment about school personnel. In Desselle v. Guillory, parents told a principal that the plaintiff teacher had carried on sexual activity with students. The plaintiff teacher sued for defamation. The court held, "A qualified privilege exists as to a communication, even if false, between parents sharing an interest or duty, as long as the communication is made in good faith and without malice."

In State v. Defley, the court found that a citizen's assertion at a public meeting that the board had hired a drunken superintendent was within the New York Times privilege. The superintendent of schools was found to be a public figure and his personal character traits were germane to fitness for office and job performance.

In Schultze v. Coykendall, a citizen presented a written complaint to the school board that the plaintiff principal disregarded his duties and was unfit for his office. The principal sued for defamation. The court held that citizens had a conditional privilege to make the complaint, requiring the plaintiff to prove the statement was false or made with reckless disregard as to whether it was false or not.

The case of Segall v. Piazza involved a letter from parents alleging that an art teacher had grabbed a student and bloodied his nose. The letter was written at the request of the principal. The court held there was a qualified privilege because the parents had a legitimate interest in making the communication.

If a school employee is sued in his official or representative capacity, he is not being sued personally, but rather as an employee of the school district. In a representative suit, damages are sought only from the employer, but there must be proof that the school employee was acting within the scope of his employment. In such a suit, if the employee is found guilty of the charge, the public entity will be held responsible for the damages charged against the employee.

In many states, however, school boards must also defend school employees against lawsuits brought against them in their individual capacity, and may be obligated to indemnify them for judgments against them if they were acting within the scope of their employment.

To protect their assets in defamation suits, school districts can, and often do, purchase from casualty companies an endorsement of their general casualty policies for libel and slander. Coverage includes costs of defense and payment of the judgment. NASSP also affords protection against such claims through its professional liability insurance policy, provided as a benefit to all members.

Conclusions

If a school employee sues as a plaintiff in a defamation action, he is usually, though not always, labeled a public figure. This label requires him to prove publication was made with actual malice, or with wanton and reckless absence of care. These difficult requirements will usually defeat litigation. This lack of success as a plaintiff is balanced to some extent by the school employee's record of success in defense against defamation suits.

As a defendant, of course, the principal has the advantage of using all the defenses that are asserted against him when he is suing as a plaintiff. Sometimes the principal-defendant may assert that the plaintiff is a public figure, thereby placing a substantial burden on the plaintiff. More often, the principal may assert at least a qualified privilege as to the communication in question. Finally, the principal should realize that the school board may have a duty to defend its employees in defamation suits filed against them individually or in their official capacity. Professional associations may well provide protection through insurance. Thus, in answer to the question posed by this paper: Are the principals' fears of defamation liability justified, one would seem justified in answering with a resounding "no!"

This Legal Memorandum was prepared by Allen D. Schwartz, partner in the Chicago (Ill.) law firm of Robbins, Schwartz, Nicholas, Lifton & Taylor.

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